Supreme Court, U.S.
FILED
FEB 25 2002
CLERK

No. 01-394

IN THE

Supreme Court of the United States

WARREN CHRISTOPHER, MARILYN McAFEE, ALEXANDER WATSON, ANNE PATTERSON, PEG WILLINGHAM, ANTHONY LAKE, and RICHARD E. FEINBERG,
Petitioners,

vs.

JENNIFER K. HARBURY,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE D.C. CIRCUIT

BRIEF FOR RESPONDENT

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Questions Presented

1. If United States officials first offer assistance, then affirmatively deceive, a citizen in order to prevent her from proceeding to federal court for emergency injunctive relief to save her husband from torture and imminent extrajudicial execution at the hands of CIA operatives, has the constitutional right to access to the courts been violated?

2. If United States officials did engage in such conduct, did they violate clearly established law so as to prevent qualified immunity?

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OCTOBER TERM 2001

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BRIEF FOR RESPONDENT
JENNIFER K. HARBURY

INTRODUCTION

This case raises the remarkable question of whether the constitutional right of access to the courts is violated when U.S. government officials intentionally prevent, through the use of affirmative deception, a citizen from proceeding to the courts for emergency injunctive relief, when they know that her spouse is

suffering torture and is at risk of imminent extrajudicial execution, and that U.S. officials are implicated in that situation.

STATEMENT OF THE CASE

Respondent Jennifer Harbury is a United States citizen, and the widow of Efrain Bamaca Velasquez. Second Amended Complaint, ¶¶ 9, 33, Joint Appendix (J.A.) 23,26. Mr. Bamaca, a long-time opponent of the repressive regime in Guatemala and a commander of the Guatemalan resistance forces, disappeared on March 12, 1992. Id., ¶¶ 33, 34, J.A.26-27. The Guatemalan army reported that he died in combat. Id., ¶ 34, J.A.26-27.

In early 1993, Ms. Harbury learned that from an escaped prisoner that her husband was in fact captured alive, and was being secretly detained and tortured by Guatemalan military officers. Id., ¶¶ 50-54, J.A. 29. She did not know where he was being held.

Upon learning that her husband was alive and suffering torture, Ms. Harbury immediately contacted the State Department. She met repeatedly with State Department officials, including various Petitioners, asking for assistance in locating her husband and obtaining his humanitarian treatment. Throughout these meetings, Petitioners told her that they possessed no information about her husband, but that they would attempt to determine his fate and assist her. Id., ¶¶ 55, 59,67, J.A.30,31 . In fact, these statements were false:

Petitioners had been informed by the CIA long since that her husband had been captured alive and was being secretly detained and tortured. Id., 35, 56-57, J.A. 27, 30. Petitioners, furthermore, knew that agents of the U.S. government were involved in Mr. Bamaca's detention and torture. Id., ¶¶ 37, 44, J.A 27, 28. During their discussions with Ms. Harbury, they also knew that he was still alive. Petitioners intentionally deceived Ms. Harbury in order to prevent her from seeking legal remedies against the government. ¶¶ Id., 67-69,92, J.A. 31-32,36.

Throughout 1993 and 1994, Ms. Harbury made numerous efforts to locate and rescue her husband. She was permitted to open the grave in which the Guatemalan military claimed to have buried him, and found the body of quite a different man. Id., ¶ 60, J.A. 30. She continued to meet with State Department officials, who repeatedly deceived her, stating that they had searched for information about her husband but that they had no information about what had happened to him. Id., ¶¶ 55, 59, 61-63, 67-68, 70-77, J.A. 29-33. Petitioners also stated publicly and in letters to members of Congress that they had no information about Mr. Bamaca. Id., ¶¶ 59, 73-74 J.A,. 32-33.[1]

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[1] See, for example, Letter to Sen. Brown, Nov. 1993, stating in relevant part " We have no independent evidence about the fate of Mr. Bamaca" May 11, 1998 Hearing, "Access to Government Information and HR 2635", Subcommittee On Government Management, Information and Technology, United States House of Representatives, 105th Congress, Second Session, (Serial No. 105-

Relying on the State Department claims that they had no information, Ms. Harbury attempted to obtain information from the Guatemalan military itself. She twice engaged in hunger strikes in Guatemala in an effort to determine the whereabouts of her husband. Id., ¶¶ 64, 78-80, J.A. 31, 33-34. After a 32-day hunger strike in 1994, the television show "60 Minutes" aired a broadcast revealing that the U.S. embassy in Guatemala did, in fact, possess information indicating that her husband had been captured alive. Id. ¶ 81, J.A. 34. The State Department Petitioners then acknowledged for the first time that they indeed had confirmation from U.S. intelligence files of his initial capture and secret detention by the Guatemalan military. They still insisted that they had no further information regarding his current situation. Id., ¶ 82, J.A. 34. Ms. Harbury also met with the National Security defendants, who told her that they had "scraped the bottom of the barrel" for information, but had nothing further. Id., ¶ 83, J.A. 34.

Now aware that the Petitioners were deceiving her about the existence of information about her husband, Ms. Harbury filed Freedom of Information Act (FOIA) administrative request with all relevant agencies. Id.,¶ 85, J.A. 34-35. Receiving no response despite the exigent circumstances, she resumed her hunger strike. Id.,¶¶ 85, 87-90, J.A. 34, 35-56. On the twelfth day, United States Senator Robert Torricelli informed her that her husband had been killed by a

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175), at pp. 66-67. See Appendix, item B.

paid CIA informant. Id.,¶ 91, J.A. 36. Information later declassified and released in response to Ms. Harbury's FOIA lawsuit and in a report by the President's Intelligence Oversight Board, confirmed that Mr. Bamaca had been captured alive, tortured and extrajudicially executed, and that CIA operatives were responsible. Id.¶¶36-49, 91, J.A. 27-29, 36.

In addition, the publicly released information indicated that throughout 1993, as Respondent was seeking information about her husband and being told repeatedly that none existed, Petitioners were aware that he was still alive, suffering torture, and in danger of extrajudicial execution. Id.,35, 56-58, J.A.27, 30.

PROCEEDINGS BELOW

1. Ms. Harbury filed this lawsuit in 1996 against Petitioners and CIA officials, raising various claims. First, Ms. Harbury asserted three constitutional claims, alleging that the CIA defendants violated her husband's Fifth Amendment due process rights; her own right of familial association; and her right of access to the courts. In addition, she asserted various torts. Second Amended Complaint, J.A. 19-64.

2. In March 1999, the District Court dismissed all of Ms. Harbury's constitutional claims, Pet. App. 30a, entering final judgment on this decision in August of that year. Pet. App. 60a. The Court held that as a foreign national residing in a foreign country, Mr. Bamaca was not entitled to Fifth Amendment

substantive due process protections, and that even if he were, such right was not clearly established. Pet. App. 36a-43a. With respect to Ms. Harbury's access to courts claim, the Court dismissed because she had not sought a state court remedy first, and because defendants would anyway be entitled to qualified immunity. Pet. App. 43a-49a. Ms. Harbury's claim based on her right of familial association was also denied. Pet. App. 52a. Ms. Harbury's tort claims remain pending.

3. On appeal, the D.C. Circuit upheld the District Court's dismissal of Mr. Bamaca's substantive due process claim and Ms. Harbury's familial association claim. Pet. App. 1a. The D.C. Circuit however, overturned the decision on the access to courts claim, noting the uniform consensus in the circuit courts on this issue. Pet. App. 21a-22a

The Court then concluded that Ms. Harbury had plead a violation of the constitutional right of access to the courts and rejected the argument that she must first have attempted to bring a state court claim. The Court reasoned that such a prerequisite is unnecessary in the limited number of cases where such a proceeding would be "futile." Pet. App. 26a. As for Petitioners' qualified immunity, the Court held that it was "obvious" that such conduct was unconstitutional. Id. at 28a. The Defendants below filed timely motions for Rehearing and for Rehearing En Banc, which were denied.

SUMMARY OF THE ARGUMENT

1. The due process right to access to the courts has been deemed fundamental since *Chambers v. Baltimore& Ohio R.R.*, 207 U.S. 142 (1907). This right includes not only the right to access itself, *Ex Parte Hull*, 312 U.S. 546 (1941) but also the right to obtain and fully present evidence and legal arguments in a fair hearing. *Bounds v. Smith*, 430 U.S. 817 (1977) and *Little v. Streater*, 452 U.S. 1 (1981). By corollary, such presentation may not be thwarted by the concealment or falsification of key evidence. *Brady v. Maryland*, 373 U.S. 83 (1963), *Miller v. Pate*, 386 U.S.1 (1967). When officials intentionally engage in a cover up to prevent an aggrieved person from filing suit against the government, the right to access to courts is violated. *Bell v. City of Milwaukee*, 746 F.2d 1205 (7th Cir. 1984).

2. Respondent, Ms. Harbury, has stated a claim for violation of her right to access to the courts. She alleges that her husband, Efrain Bamaca Velasquez was captured alive by the Guatemalan army in March, 1992, and was subjected to long term and severe torture by military intelligence officials serving as CIA paid informants, or "assets". In order to prevent international outcry, these officers falsely reported that Mr. Bamaca had died in combat. Fully aware of this situation, CIA officials continued to seek and pay for information being simultaneously extracted from him by their assets through the use of torture. Ms. Harbury learned in early 1993 that her husband was still alive and in secret detention, though she knew not where.

Nor did she know of the CIA involvement. She promptly sought the assistance of various State Department officials, who stated that they had no information, but promised to investigate and assist her. Petitioners continued to insist to Ms. Harbury and inquiring Congressional Members, that they possessed no information until late 1994. In fact, as alleged by Ms. Harbury, the Petitioners had from the beginning been fully notified by the CIA of Mr. Bamaca's situation, and the U.S. involvement therein, and received numerous bulletins throughout their two year course of dealings with Ms. Harbury. The needed information was in fact deemed proper for declassification by the government itself. Had such information been timely provided, she could have proceeded to the courts for emergency injunctive relief to save her husband's life. Instead the Petitioners chose to affirmatively deceive Ms. Harbury so as to obstruct her search and prevent her from filing suit against the government. By the time the truth was revealed, her husband had been murdered.

3. Ms. Harbury does not assert that the Petitioners had a legal duty to affirmatively seek her out and inform her of her husband's situation. However, they were prohibited by the constitution from affirmatively deceiving her in order to prevent her from seeking court redress. Such conduct was in and of itself tortious, especially once the Petitioners promised her they would assist and investigate .

4. Ms. Harbury does not argue that all information concerning her husband, including state secrets, should

have been released to her. Rather, she argues that the government eventually reviewed and declassified many government files. Such declassified information, by definition, did not constitute state secrets. These very files, if timely revealed, would have provided her with all the facts needed to state a claim in federal court while her husband was still alive.

5. There were numerous causes of action for emergency injunctive relief which Ms. Harbury could have presented in federal court, had the crucial information not been concealed. Suit for injunctive relief would have been brought against high level CIA and other federal officials in Washington D.C. issuing decisions and orders regarding Mr. Bamaca's treatment, requesting further information from him, allocating federal funds to pay for such information, despite the ongoing use of torture, and engaging in the cover up. On her own behalf Ms. Harbury could have claimed violations of her constitutional rights to the pursuit of happiness, as well as to protect and preserve her family, and the intentional infliction of emotional distress. On behalf of her husband, she could have sued for failure to supervise, and for civil conspiracy, regarding assault and battery.

6. Ms. Harbury's claims do not improperly infringe upon matters of foreign affairs. To the contrary, a ruling will simply deter public officials from improperly barring the doors to the courthouse. There is no need to evaluate our national foreign policy or require any changes thereof. Moreover, such a ruling would be fully

harmonious with our long standing national policy of respect for human rights and the prohibition of torture.

7. A Bivens remedy is fully appropriate in this case. Ms. Harbury's fundamental right to access to the courts has been violated, and no award of damages can remedy the loss of her day in court in this context. No comprehensive statutory scheme addresses the rights and harms presented here. Deterrence is appropriate to protect the citizenry's fundamental right to access to the courts.

8. Qualified immunity is not appropriate, as the standards of the due process right to access to the courts have long been clearly and fully articulated.

ARGUMENT

I. ACCESS TO COURTS

The due process right to access of the courts has long been held sacrosanct. As stated by this Court in *Chambers v. Baltimore & Ohio R.R.*, 207 U.S. 142, 148. (1907):

> The right to sue and defend in the courts is the alternative of force. In an organized society it is the right conservative of all other rights, and lies at the foundation of orderly government. It is one of the highest and most essential privileges of citizenship.

This Court has been both swift and vigilant in preserving this fundamental right. Protection has been granted in a number of different contexts. See : *Ex Parte Hull*, 312 U.S. 546 (1941)(prison regulation prohibiting prisoners from filing a petition for habeas corpus unless found "properly drawn" by a state official); *Johnson v. Avery* 393 U.S. 483 (1969)(prison regulation prohibiting inmates from offering legal assistance to one another); *Boddie v. Connecticut*, 401 U.S. 371 (1970) (state fee requirement for filing for the divorce); *Little v. Streater*, 452 U.S. 1 (1981)(provision of blood testing in indigent father's paternity suit). *Gideon v. Wainwright*, 372 U.S. 335 (1963) (counsel for the criminally accused); *Boddie v. Connecticut*, 401 U.S. 371, (1970) (provision of transcripts for accused on appeal); *Lindsey v. Normet*, 405 U.S. 56 (1972) (double bond requirement for appeals of evictions); *Bounds v. Smith, 430 U.S. 817 (1977)* (reasonable access to law libraries for inmates); *M.L.B. v. S.L.J.* 519 U.S. 102 (1996) (provision of transcript for appeal of termination of parental rights). In recent years this Court has taken care to curb overly intrusive remedial orders from the lower courts, to give proper deference to state expertise or the state right to assess regulatory fees. *Lewis v. Casey*, 518 U.S. 343 (1996). However, the transcendent importance of the right to access itself remains fully recognized and vigorously preserved.

The Petitioners in this case urge that the access to courts doctrine is limited to cases involving an institutional bar to filing suit or the special needs of prison inmates. Although these two factual scenarios

are, indeed, frequently presented, this Court has never imposed such narrow parameters on so fundamental a right. Deeply rooted in the Due Process Clause, this doctrine carefully mirrors the basic requirement that the government provide an opportunity to be heard, and that hearing provided be a fair one.

As the cases make clear, the due process right of access to the courts is multi-faceted and must be flexibly applied. Certainly any structural mechanisms barring actual access will be struck down, as they literally place a fair court hearing beyond the reach of an aggrieved person. Thus, as in *Ex Parte Hull*, supra, a state official may not weed out inmate petitions failing to meet with his personal approval. Nor may a state impose such burdensome fees that the right to actual access for many seeking to redress crucial interests, becomes void. *Boddie v. Connecticut*, supra.

The Court has, however, also been vigilant in preserving and protecting the quality of the court hearing itself, and has not permitted the right of access to become an empty formality. Rather, access must be "adequate , effective and meaningful." This second prong of the right has required that the party not only be able to appear in court, but must also be permitted to develop and make the most full and reasoned presentation of evidence, witness testimony, and legal arguments within his ability. Under special circumstances, affirmative assistance has even been required. Thus in *Little v. Streater*, 452 U.S. 1 (1981), the Court required that blood testing be provided to an

indigent putative father in a state ordered paternity suit. In *Lassiter v. Department of Social Services*, 452 U.S. 18 (1981), it was held that a parental rights termination hearing might sometimes require the provision of legal counsel. Moreover, a transcript adequate to permit reasonable identification and review of errors of law or fact is important in preserving such fairness. *Mayer v. Chicago* 404 U.S. 189 (1971). For the same reasons, the state must permit prison inmates reasonable access to law books or legal advisors in order to develop their presentations, *Johnson v. Avery*, supra and *Bounds v. Smith*, supra.

By corollary, state officials may not take affirmative steps to wrongfully conceal, destroy or falsify crucial evidence. It is basic jurisprudence that when such misconduct thwarts the right to a fair, and effective hearing, the due process clause has been violated. *Brady v. Maryland*, 373 U.S. 83 (1963), *Napue v. People of the State of Illinois*, 360 U.S. 264 (1959), *Miller v. Pate*, 386 U.S. 1 (1967), *Giglio v. United States*, 405 U.S. 150 (1967), *Washington v. Texas*, 388 U.S. 14 (1967), and *Kyles v. Whitley*, 514 U.S. 419 (1995). In short, in the context of the due process requirement of a fair, and meaningful hearing, the right to access to courts and the right to a fair hearing are precisely co-extensive, the two phrases representing but two descriptions of the same principle.

In close keeping with these clear mandates, the federal courts of appeals have repeatedly held that when officials engage in an affirmative and wrongful

cover up of key information, with the intention of preventing a lawsuit from being filed against the government, and harm occurs, then the due process right to access to the courts has been violated. Even when litigation is filed, but a fair, meaningful and effective hearing of the claim is crippled by such cover-up, due process has been violated. *Bell v. City of Milwaukee*, 746 F2d. 1205 (7th Cir 1984); *Ryland v. Shapiro*, 708 F.2d 967,973-75 (5th Cir. 1983); *Barrett v. United States*, 798 F.2d 565,575 (2d Cir. 1986). See also, *Vasquez v. Hernandez*, 60 F. 3d 325, 328 (7th Cir. 1995), *Swekel v. City of River Rouge*, 119 F3.d 1259,1262 (6th Cir. 1997); *Delew v. Wagner*, 143 F.3d 1219, 1222 (9th Cir. 1998).

The ruling in *Lewis v. Casey*, 518 U.S. 343 (1996) does not alter the legal requirements and prohibitions discussed above, but rather simply limits their inappropriate expansion in the prison context. In *Lewis*, the Court struck down an overbroad injunction requiring sweeping reforms of a prison legal system, especially given the failure to establish actual harms. Specifically, the Court held that the State was not required to take affirmative action to enable prisoners to discover grievances, and litigate effectively, or in short, to become "litigating engines" in all fields of law, id, 354-355. However, the Court also recognized that a valid grievance would indeed be presented if the legal library or legal assistance program was so inadequate as to actually hinder efforts to pursue a claim, or even file a complaint. This ruling is inapposite to the above cited cases, all of which deal with affirmative and wrongful

actions taken by officials with the intent to prevent the filing of suit, and with resulting actual harm.

It is clear from the above that the decision of the appellate court in this case was fully justified by substantial legal precedent, as well as the mandates of the Due Process clause itself. In the context of a motion to dismiss for failure to state a cause of action, the reviewing court must take all of the plaintiff's assertions as true, and those allegations should be construed favorably to the pleader. *Scheuer v. Rhodes*, 416 U.S.232, 236 (1974). A complaint should not be dismissed "unless it appears beyond doubt that plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41,45-46 (1957).

Ms. Harbury has pleaded that the government Petitioners intentionally deceived her in order to block her access to critical information about her husband's situation, and thus vitiate her ability to file suit against the government. This wrongful and affirmative obstruction was so complete as to not only deprive Ms. Harbury of a meaningful hearing; it deprived her of even the facts necessary to state a cause of action. Until March 1995 she had no awareness of any U.S. involvement in her husband's plight. Such official misconduct falls squarely within the principles enunciated above.

Ms. Harbury specifically asserts that during much of the period of deception, her husband was alive,

suffering torture, and in danger of extra-judicial execution by CIA operatives, and that Petitioners were fully aware of these exigent circumstances. Moreover, they possessed numerous records that the government itself deemed appropriate for declassification, and which would have provided her with all necessary facts. Had she timely received those records, she would have immediately proceeded to the courts to seek emergency injunctive relief. Instead the Petitioners chose to obstruct and thwart her investigation by affirmative acts of deception; indicating again and again that they had no information but would attempt to assist her. But for this deception, she could have obtained the documents through administrative requests under the Freedom of Information Act, or effectively sought the assistance of Congress. Since both Ms. Harbury and concerned Congressional Members were repeatedly informed that was no information to seek, legal demands for "non-existent" information were not pursued by either. Instead, Ms. Harbury risked her life attempting to gain information directly from the Guatemalan military itself. In short, crucial information necessary to a fair, effective and meaningful hearing was placed beyond her reach through wrongful and affirmative state conduct. Given her husband's death, relief is no longer available.

The misconduct of the Petitioners, if condoned, would have frightening repercussions with regards to both the safety and trust of the American public. United States Customs officials, for example, might well seek to work with a known "coyote" group (persons bringing

undocumented aliens to the United States, usually in return for exorbitant fees) in order to obtain important information about narcotics smuggling. However, if that group were to engage in the kidnaping of young women for use in a prostitution network, could Customs officials lie to the U.S. parents and state that they possessed no information about their daughters? If Customs officials had full knowledge of the situation, could they continue to make payments to the ringleader in return for the flow of information? Could they do so knowing that he was personally abusing the daughter?

Similarly, could Department of Energy officials, knowing that a contractor was causing toxic wastes to leak into a local neighborhood, causing an epidemic of diseases amongst the children, affirmatively deceive inquiring parents about the causes, when such information was critical to the medical cure? Could payments to the contractor continue without requiring improved safety procedures? Clearly the answer must be no, without extraordinary circumstances meeting the strict scrutiny standard of review.

A. Ms. Harbury's Claims Are Based upon Affirmative Efforts to Deceive, Not the Failure to Affirmatively Inform; and Ms. Harbury Had the Right to Rely upon the Truthfulness of Government Statements.

This case is rooted in government acts of deception and cover up. The Petitioners seek to skew the nature of claim presented, by citing *Lewis v. Casey,*

518 U.S. 343 (1996) for the proposition that the government bears no responsibility for affirmatively assisting a person to discover grievances. However, Ms. Harbury has never asserted that the officials in question should have taken affirmative steps to locate and inform her of her husband's situation when they first learned of it in March 1992.

To the contrary, Ms. Harbury claims that once she sought information and help from these U.S. officials, they agreed to help her, then affirmatively and impermissibly deceived her again and again. The intended goal was to assure that she could not discover the truth and bring suit against the government This difference was noted by the Court of Appeals.

Although the officials in question may not have had a duty to affirmatively inform Ms. Harbury of her husband's situation, they were barred from taking affirmative steps to intentionally deceive her. Not only did such actions violate Ms. Harbury's due process rights, they constituted tortious action in and of themselves. *Smith v. Brown & Williamson Tobacco Corp.*, 108 F.Supp. 2d 12, 15 (D.D.C.2000). Moreover, where Petitioners promised repeatedly to investigate, assist and report back, then intentionally placed her in harm's way, the wrongful nature of their conduct is exacerbated. Restatement (Second) of Torts, § 323 and 324.

The Petitioners' arguments regarding the government need to occasionally use stealth and

deception are inapplicable here. Those cases are rooted in the law enforcement context and simply note the right of a police force to use appropriate investigation techniques. *Jacobson v. U.S.*, 503 U.S. 540 (1992);*United States v. Russell*, 411 U.S. 423 (1973). Persons involved in criminal activities may be subjected to acts which would be prohibited with regards to any civilian, such as a stop, search, and even an assault. The very nature of law enforcement investigations makes inevitable the occasional application to the innocent as well as the guilty. However, even in these cases there are clear limits on the use of deception. *Lynum v. Illinois*, 372 U.S. 528 (1963). None is relevant here. Ms. Harbury was not suspected of perpetrating a crime; rather, she was attempting to prevent one.

Ms. Harbury, moreover, had every right to presume and rely on the truthfulness of official government statements to her. See *United States v. Fallen* 498 F.2d 172 (8th Cir. 1974). For precisely this reason, the courts have long permitted equitable tolling in cases involving government cover-ups. The aggrieved party will not be penalized for reasonable reliance on the truthfulness of officials. *Bell v. City of Milwaukee*, 746 F.2d 1205, 1228 (7th Cir. 1984); *Barrett v. United States*, 689 F.2d 324,328 (2nd Cir. 1982); *Hohri v. United States*, 782 F.2d 227 (D.C. Cir. 1986)

It was not until November 1994, nearly thirty days into her hunger strike in Guatemala City that Ms. Harbury learned from a "60 Minutes" broadcast that the Petitioners were deceiving her, and that critical

information did in fact exist in U.S. files. She then, indeed, took appropriate independent action to obtain that information.

Should citizens not have the right to trust in the honesty of government officials, the results would wreak havoc. Could government health officials falsify records in experimentation cases, then defend on the grounds that the relatives should have simply guessed, in the absence of any evidence, that falsification had occurred and filed a FOIA suit? Surely not. Any other answer could only create distrust of the government, invite official corruption and promote injustice. Moreover, it would obligate the citizenry to file needless litigation to preserve their rights.

Ms. Harbury, furthermore, has never claimed that the government officials should have given her *all* of the information they possessed about her husband, including matters of state secrets. Indeed, such information even today remains classified and beyond her reach. Of this she does not complain. Rather, she asserts that a great deal of information was in fact appropriate for declassification and release. This is shown by the fact that in late 1995 the government itself did review the files and then declassify and release numerous records through the Freedom of Information Act. Still more files were voluntarily declassified by the Intelligence Oversight Board in 1996. The information deemed proper for release would have been fully adequate to enable her to file suit for her husband's life, revealing as it did the key facts of his capture, torture,

risk of extra-judicial execution, and the involvement of a number of CIA operatives. Sadly, it took a three year campaign by Ms. Harbury, Congressional wrath, a sweeping White House investigation, a futile effort by Ms. Harbury in January 1995 to obtain the records through the FOIA, and the filing of federal litigation, before information began to trickle in to her hands. Had this very information been timely disclosed, instead of affirmatively concealed, Ms. Harbury could have acted to save her husband's life.

In light of the above, the government Petitioners had several acceptable choices available to them. Even without a FOIA request, they had the authority to arrange for declassification, and release of the documents, as stated by their own legal department.[2] In addition, they had a number of proper alternatives. They could have remained silent altogether, or informed Ms. Harbury that they were unable to assist her or to comment on the matter. Further, they could have given a Glomar response, refusing to either confirm or deny the existence of any information. Any of those appropriate responses would have alerted Ms.

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[2] Declassified State Department document, dated March 1995, discussing how to answer press questions in light of the divulgations. " We should not use the "legally proscribed from releasing classified intelligence to private individuals..." language I suggested yesterday. Sorry if I steered you wrong on this. After our exchange of e mails I consulted INR's person in L. His comments are attached and make sense. Their view, in short, is that we (the exec. Branch) could have made a decision to declassify the --intell and share it with Harbury. Sorry." Appendix, Item C.

Harbury that information might or might not exist, and she would have swiftly moved to ascertain the matter by resort to the FOIA or Congressional assistance.

Indeed, the Glomar denial was developed for precisely this situation, as it protects all sensitive information without permitting the government to engage in deceit. Although the Petitioners urge that a repeated use of the glomar denial might lead to a flood of FOIA cases, the reverse is, in fact, true. Should citizens know that their officials have the right to lie, then the public distrust would lead to a flood of wasteful and defensive litigation.

The proposition that government officials may affirmatively deceive a citizen, in order to thwart a fundamental right such as access to the courts, is untenable. The hypothetical situations suggested by Petitioners have no bearing on this issue, as none involve deceptions intended to prevent the filing of suit.

B. In 1993 Ms. Harbury Could Have Filed Suit in Federal District Court for Emergency and Declaratory Relief. These 1993 Causes of Action Are Concrete and Not Conjectural.

The government Petitioners in this case assert that Ms. Harbury could not have brought any legal actions in 1993 through 1994 to save her husband's life, or, in the alternative, that such claims are vague and conjectural. Such assertions are incorrect.

In 1993, while Mr. Bamaca was known to be still alive[3], Ms. Harbury could have brought suit for declaratory and injunctive relief in federal district court, stating various causes of action. The facts alleged would have been similar to those presented in the case at bar. She would have claimed that CIA officials were authorizing, requesting, causing, aiding, participating and conspiring in the ongoing torture of her husband at the hands of their paid agents, or "assets" in Guatemala. Specifically, such CIA agents were knowingly causing her husband's torture by seeking and paying for information which they knew was *contemporaneously* being extracted from him by those "assets", through the use of torture, in order to obtain such payments. Such actions were placing him in danger of imminent extra-judicial execution. Cover up efforts were blocking his rescue.

Contrary to the Petitioners' assertions, the legal claims would not have been brought against the Guatemalan government or any Guatemalan agent. Rather, suit would have been brought against high level CIA officials in Washington D.C. who were rendering decisions and orders as to the treatment of Mr. Bamaca, the cover-up of his situation, the payment for information being extracted from him through torture; and allocating and transmitting federal funds for such actions. The suit would have included implicated CIA

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[3] New evidence exists suggesting that Mr. Bamaca in fact survived well into 1994 if not longer.

officers in Guatemala, and other officials implicated in an ongoing cover-up.

The harms alleged in such litigation would have been Ms. Harbury's emotional distress, loss of consortium, and the pending destruction of her family. The harms to Mr. Bamaca would also have been presented by Ms. Harbury as his guardian or next of kin, and would have included his acute physical harm and imminent loss of life.

The precise causes of action set forth in Ms. Harbury's 1993 complaint would have included the following :

1. Violation of Ms. Harbury's Fifth Amendment Rights:

In 1993, Ms. Harbury could have properly presented a claim for injunctive relief under the Fifth Amendment for deprivation of her liberty interests. Not only were the CIA defendants promoting her husband's torture and endangering his life, but as a result of the improper concealment, neither she nor Congress were able to insist on his humanitarian treatment or his right to a fair trial. Instead, Ms. Harbury was left to risk her own life in a long and futile campaign in Guatemala. These actions inflicted grave emotional distress upon Ms. Harbury. Indeed, the official conduct towards her can only shock the conscience.

The orderly pursuit of happiness has long been recognized as a basic component of the right to liberty protected by the Due Process Clause of the Fifth Amendment. As stated in *Meyer v. Nebraska,* 262 U.S. 390, 399 (1923);

> "[T]he liberty thus guaranteed...denotes [illegible] merely freedom from bodily restraint, but also the right of the individual to contract , to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally, to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men." (citing Slaughter House cases, 16 Wall.36).

See also, *Zablocki v. Redhail,* 434 U.S. 374 (1978) and *Loving v. Virginia,* 388 U.S. 1 (1967) (matters involving marital relationships were among such essential personal rights).

Clearly, the conduct of the CIA and other officials in 1993 constituted a wrongful emotional battery in violation of Ms. Harbury's protected liberty interests in the orderly pursuit of happiness. Accordingly, she would have had the right to proceed to the courts for injunctive relief. There would have been no sovereign immunity bar as constitutional

violations have long been ruled to be actions which, by definition, do not represent the government. See *Larson v. Domestic and Foreign Commerce Corp.*, 337 U.S. 682 (1949).

2. Violation of Ms. Harbury's Constitutional Family Rights :

Ms. Harbury had a fundamental right to marry, to remain married, and to preserve her family. Indeed, marriage has long been accorded the highest of constitutional protections, and efforts to infringe upon such rights have been sharply curbed. *Loving v. Virginia* 388 U.S. 1 (1967) (" Marriage is one of the 'basic civil rights of man', fundamental to our very existence and survival." Id. at 12-13). See also *Zablocki v. Redhail*, 434 U.S. 374 (1978), and *Boddie v. Connecticut*, 401 U.S. 371 (1971). This penumbra of privacy has been extended as well to all aspects of family affairs. *Meyer v. Nebraska*, 262 U.S. 390 (1923). *Planned Parenthood v. Casey*, 505 U.S. 833 (1992);*Griswold v. Connecticut*, 381 U.S. 479 (1965); *Prince v. Massachusetts*, 321 U.S. 158 (1944); and *M.L.B. v. S.L.J.*, 519 U.S. 102 (1966).

In light of the above, Ms. Harbury had the right to marry Mr. Bamaca, bear his children, raise a family as the two of them saw fit, and even terminate their relationship through divorce if they so wished. Given this broad penumbra of protection and privacy, Ms. Harbury clearly had the right to protect and preserve her family. In 1993 she could have filed suit, claiming that the CIA defendants were unlawfully blocking her

rescue efforts despite awareness of her marriage and her efforts to save her husband.[4] Again, she would have had the right to seek injunctive relief for violation of her Due Process rights. Sovereign immunity would have presented no bar.

3. Conspiracy to Commit Assault and Battery:

In 1993, Ms. Harbury could also have stated a claim for civil conspiracy to commit assault and battery. To establish a conspiracy, the plaintiff must show that there was an agreement to participate in unlawful actions, or lawful actions via unlawful means, and that there was an overt act taken, resulting in a harm or injury. *Wiggins v. Hitchins* , 853 F.Supp. 505 (1994) Aiding and abetting is established where a person knowingly assists a tortfeasor, and is aware of his role in the illegal activity at the time. *Halberstam*, 705 F.2d 472,479 (D.C. Cir. 1980).

In light of the factual allegations set forth above, Ms. Harbury could have stated claims for both civil conspiracy to commit, and aiding and abetting, unlawful actions. For conspiracy, she would have alleged that the CIA had entered into an agreement with their assets that Mr. Bamaca should be tortured for

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[4] This claim was dismissed by the Appellate Court in the context of a Bivens claim for damages, in light of the potential floodgate of suits from various relations in a wrongful death case. However, no such concerns would arise where the violations were ongoing, and injunctive and declaratory relief were sought.

his information, and that they would, in return, pay for such information. Payment was made, constituting the overt act. Both Mr. Bamaca and Ms. Harbury were harmed as a result. All U.S. officials involved in a continuing cover- up would also have entered into the agreement, committed an overt act (i.e. the cover up itself), with the resultant harms described. Similarly, such actions aided and abetted the assault and battery.

A federal court would have had jurisdiction to hear Ms. Harbury's claim for injunctive relief under the doctrine of pendant jurisdiction[5]. State law may not expand or limit the scope of authority of a federal officer, *Bivens v. Six Unknown Agents of the Federal Narcotics Bureau*, 403 U.S. 388, 395 (1971), but such officer may nevertheless be subjected to non-conflicting state law claims. This reality is reflected in the provisions of the removal statutes, such as 28 U.S.C. 1442. *Arizona v. Maypenny*, 451 U.S. 232, 241-243 (1981). Indeed, common law tort claims against federal officials are routinely handled under the Federal Tort Claims Act, 28 U.S.C. §§ 2674. Here, a federal court would have been determining the key federal issues. The relevant question is thus whether sovereign immunity or pre-emption issues arose.

Sovereign immunity can never be applicable in the context of torture, and officials engaging in such actions do not represent the sovereign. In *Larson v.*

[5] The federal court would also have had diversity jurisdiction.

Domestic and Foreign Commerce Corp., 337 U.S. 682 (1949) two exceptions to sovereign immunity were clearly set forth.

> [W]here the officer's powers are limited by statute, his actions beyond those limitations are considered individual and not sovereign actions. The officer is not doing the business which the sovereign has empowered him to do or he is doing it in a way which the sovereign has forbidden. His actions are *ultra vires* ... and therefore may be made the subject of specific relief.

Id., at 689.

The CIA officials in question here were clearly acting outside the scope of their statutory authority. While they certainly have the authority to collect, correlate and evaluate intelligence relating to national security, that authority is not without limits. Torture is far beyond such limits. Injunctive relief was thus appropriate.

While the purchase of crucial intelligence from "unsavory" persons might sometimes be appropriate and necessary, there is no justification for requesting and paying for information being simultaneously extracted from a human being through the use of torture. Such conduct crosses the line between bona fide intelligence gathering and participation in torture. Although the United States government, under limited

circumstances, is permitted to take life, it has never been permitted to engage in the torture. *Rochin v. California*, 342 U.S. 165, 169 (1952)(government may not "offend those canons of decency and fairness which express the notions of justice of English speaking peoples even towards those charged with the most heinous offence." Federal officials may not engage in conduct which shocks the conscience. *Palko v. Connecticut*, 302 U.S. 319 (1937). It was the dream of the Founding Fathers to leave behind them the horrors of the Inquisition or the Star Chamber. *Culumbe v. Connecticut*, 367 U.S. 568, 581-586 (1961).[6] Thus the statutory authority of the CIA may not be construed to permit the direct engagement of U.S. officials in acts of torture.

Quite apart from the ultra vires nature of the CIA conduct with respect to Mr. Bamaca, yet another ground for relief existed in 1993 with respect to this tort claim. If an agency rule or regulation allegedly authorizing the CIA conduct in this case was presented, Ms. Harbury would have had the right to challenge its validity and/or its application to her husband in particular, and the waiver of immunity under the Administrative Procedure Act, 5 U.S.C.§702 would have come into effect. As high level officials were making the decisions in question, and as immediate and irreparable harm was occurring, and no avenues of appeal were provided, Ms. Harbury could have sought

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[6] See also, Geneva Conventions, Common Article 3, prohibiting the torture of prisoners of war. Appendix, item A.

equitable relief. See generally, *DRG Funding Corp. v. Secretary of Housing and Urban Development*, 76 F.3d 1212 (D.C. Cir. 1996); *Cobell v. Norton*, 240 F.3d 1081, 1094-1095 (D.C.Cir. 2001); *Schnapper v. Foley*, 667 F.2d 102, 107-108 (1981). Under precisely this analysis, Ms. Harbury could have sought equitable relief for intentional infliction of emotional distress (see, *Howard University v. Best*, 484 A.2d 958 (1984) and the refusal to supervise (*International Distrib. Corp. v. American Dist. Telephone Co.*, 569 F.2d 136 (D.C. Cir. 1977).

Such relief would have harmonized with the foreign affairs policies of that time; to promote human rights in Guatemala. The Guatemalan army was reaching near pariah status due to its human rights violations, and Congress had cut off military aid.[7] Actions by rogue operators to assist in torture undermined these policies.

4. Relief Sought :

In 1993, Ms. Harbury would have sought the following equitable relief for the above described causes of action:

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[7] In 1999 the United Nations Truth Commission published its findings on Guatemala, concluding that the army counter-insurgency tactics constituted genocide, and that the state military forces were responsible for 93% of the human rights violations during the war. "Memory of Silence", April 27, 1999, http://hrdata.aaas.org/ceh/report/english/toc.html, ¶¶ 82, 108-122.

1. Declaratory Judgement that a.) the official acts of knowingly requesting and paying for information being contemporaneously extracted through the use of secret detention and torture , b.) the official acts of deception aimed at obstructing the full and efficient investigation of Mr. Bamaca's fate, in order to prevent his rescue, and c.) the official failure and refusal to properly instruct U.S. personnel in Guatemala to cease torturing Mr. Bamaca, and present him to the courts of law, were unlawful.

2. Injunctive relief requiring that all remaining information regarding Mr. Bamaca be immediately transferred to the United States Congress, so that its members might assist Ms. Harbury through appropriate diplomatic channels, and prohibiting a) the failure t o properly supervise assets engaged in Mr. Bamaca's torture, and b.) the use of federal funds to request and purchase of information being contemporaneously extracted from Mr. Bamaca through the use of torture.

5. Injunctive Relief Would Have Been Effective and Appropriate:

Given the power and control inherent in any employer employee relationship, coupled with the significant monetary benefits provided to the CIA's assets in return for information, as well the panoply of other privileges and protections afforded such assets as part of their working relationship with the U.S. government, it is highly probable that the judicial relief

set forth above would have been enough to compel Mr. Bamaca's release to the courts of law for a fair trial. This probability is heightened by the realities of the long term economic and political relationship between Guatemala and the United States.

Moreover, injunctive relief is the traditional and finely tailored judicial tool for curbing abuses of power, and would have been appropriate here. *Illinois Migrant Legal Council v. Pilliod*, 540 F.2d 1062 (7th Cir. 1976) (racial profiling); *Clark v. Library of Congress*, 750 F.2d 89 (D.C.Cir. 1984) (discriminatory employment practices.)

In light of the above, it is clear that Ms. Harbury had a number of claims in 1993 which would have passed the "reasonable basis" test set forth in *Bill Johnson's Restaurants, Inc. v. NLRB*, 461 U.S. 731, 742-743, (1983). See also, *Bell v. City of Milwaukee*, 746 F.2d 1205, 1263 (7th Cir. 1984)("Thus the siblings' lack of recovery . . . does not vitiate their Section 1985 claim. The Fourteenth Amendment confers the right to a fair opportunity to present a claim, and the siblings' 1983 claim has a 'reasonable basis in fact or law' ".) It is sufficient that Ms. Harbury articulate 1993 claims with a reasonable basis. Bell, id. at1263 n.72. The right here is the right to access, not the right to guaranteed redress.

C. Ms. Harbury Is Not Required to First Proceed to State Court :

The Petitioners in this case urge that Ms. Harbury is barred from asserting a claim for violation

of her right to access to the courts until she has first filed her 1993 claims, and attempted to litigate them. In support of their position, they cite *Swekel v. River Rouge*, 119 F.3d 1259 (6th Cir 1997) and *Delew v. Wagner*, 143 F.3d 1219 (9th Cir. 1998). Neither ruling supports the Petitioners' claim. There is no exhaustion requirement where such efforts would be futile, or where there is no adequate remedy available. *Shalala v. Illinois Council on Long Term Care*, 529 U.S. 1 (2000). Clearly, requiring Ms. Harbury to assert her claims for injunctive relief, now that her husband is already dead, would be quite futile.

This "exhaustion" requirement is but a judicial finding that the claim presented was not yet ripe for review. Any plaintiff must show actual harm to his or her rights or interests. Indeed, this was the core objection to the sweeping injunctive provisions in *Lewis v. Casey*, supra. Where a government cover- up is promptly discovered, it may well be that the original cause of action, though delayed or temporarily diverted, may still be fully litigated. Where it is still possible to file or continue the litigation, the courts have often required the Plaintiff to do so, withholding a decision on the access to courts claim until the actual damage wreaked can be determined. As noted in *Swekel*, many of the harms resulting from a cover up may be remedied by a presiding judge, through equitable measures. Nevertheless, the courts have recognized that the delay itself may well have caused serious harm. *Ryland v. Shapiro*, 708 F2d 967, 974(1983).

For these reasons the courts have frequently withheld an immediate ruling on the access to courts claim presented, choosing instead to wait until the question of actual damages has ripened. As stated in *Delew v. Wagner* 143 F3d 1219 (9th Cir. 1998), a plaintiff cannot merely guess that a state court remedy has been rendered ineffective. See also, *Swekel v. City of River Rouge* 119 F.3d 1259 (6th Cir. 1997), *Vasquez v. Hernandez*, 60 F.3d 325 (7th Cir. 1995) Logically enough, the courts have never required that a plaintiff return to court where such an effort would be plainly futile, *Swekel City of River Rouge*, 119 F.3d 1259, 1264 n.2 , or where the damage to the claim or remedy is self evident. *Bell v. City of Milwaukee*, 746 F.2d 1205 (7th Cir. 1984).

In this case Ms. Harbury can file no claim for emergency injunctive relief in any court of law. Her husband, during the period of deception alleged, was murdered. No court can grant her now the relief she would have sought during the substantial time frame that the government officials knew he remained alive. To require a pro- forma resort to court on these claims would verge on the absurd.

D. The Potential for a Monetary Award after Mr. Bamaca's Murder Is Not an "Adequate Remedy" with Regards to Ms. Harbury's Claim for Denial of Access to the Courts.

The Petitioners claim that there is no denial of access to the courts, where, as here, there may still be

the possibility of a claim for monetary damages. In short, as Ms. Harbury might still be able to obtain damages for her lower court Federal Tort Claims Act claims, she may not be heard to complain that she was barred from preventing her husband's death. Long standing jurisprudence disagrees with this position.

In the first instance, the Petitioners are estopped from making such an argument, as they themselves continue to urge the dismissal of all remaining tort claims currently pending in the district court. In their brief, they identify not a single cause of action which they concede could still be brought for money damages.

More importantly, the Petitioners fail to recognize the fundamental difference between equitable relief and damages. By law, injunctive relief can only be granted where the plaintiff is suffering from immediate and irreparable harm. (Moore's Federal Practice, 3d Edition, §65.06(2)) . Irreparable harm, in turn, is defined as harm for which money can give no true relief. See, for example, *Beacon Theaters v. Westover*, 359 U.S. 500 (1959). Moreover, the purpose of injunctive relief is to deter, not to punish. *Rondeau v. Mosinee Paper Corp.*, 422 U.S. 49 (1975).

Such irreparable harm has been found in a broad spectrum of factual settings over the years, including, *Orleans Parish School Board v. Earl Benjamin Bush*, 242 F.2d 156 (5th Cir. 1957) (school segregation.); *Dreyer v. Jalet* 349 F.Supp. 452 (S.D. Tex. 1972) (repeated assaults and harassment in prison); *Honig v. Doe* , 484 U.S. 305

(1988)(expulsion of disabled children). Equitable restraining orders, moreover, are routinely issued by the courts in the context of domestic violence. Clearly, ongoing torture and familial destruction would constitute irreparable harm.

Obviously, if money damages were an adequate substitute for equitable relief, then no injunctions could ever be granted. The concept that money cannot buy everything forms the very basis of equitable relief. The goal of Ms. Harbury's lost day in court was the preservation of her husband's life. Her current, limited, claims for damages offer no qualitative equivalent. The principle that monetary damages do not offer an adequate remedy is confirmed in *Logan v. Zimmerman Brush Company*, 455 U.S. 422 (1982), a case involving employment discrimination. A post deprivation hearing in that case was ruled inadequate : "That is particularly true where, as here, the State's only post-termination process will never make the complainant entirely whole: the Illinois Court of Claims Act does not provide for reinstatement...and even a successful suit will not vindicate entirely Logan's right to be free from discriminatory treatment." Id. at 436-437.

Petitioners mistakenly rely on certain access to courts cases, such as *Swekel v. City of River Rouge*, 119 F.3d 1259 (6th Cir 1997), and *Delew v. Wagner*, 143 F.3d 1219 (9th Cir. 1998). However, both cases involved government cover ups which occurred *after* the shootings in question had already happened. Thus the harm caused was merely the delay of an action for

damages. No possibility of injunctive relief to prevent the original harm had ever existed, and thus was never lost.

For these same reasons, the Petitioners' arguments regarding claims for spoliation of evidence and similar torts are untenable. The *Swekel* court did note that such remedies might be a way to supplement any damages caused by the improper delay of the plaintiffs' money damages claims. However, in this case, the cause of action was destroyed, not merely delayed. Suggesting that such a common law tort claim may substitute for federal court determination of the right to access to the courts, deemed fundamental since *Chambers v. Baltimore & Ohio R.R.*, 207 U.S. 142, 148 (1907) is unreasonable. Such a practice would place the most basic interpretations of the United States constitution beyond the reach of the federal judiciary and fundamental constitutional rights would, for all practical purposes, be displaced by state tort law.

E. Ms. Harbury's Claims Are Not Barred by the Doctrine of Parratt v. Taylor .

The government Petitioners also make the rather remarkable claim that Ms. Harbury is barred by *Parratt v. Taylor*, 451 U.S. 527 (1981) from asserting a claim for her lost 1993 case, and instead must be satisfied with any remaining state remedies.

The *Parratt* case requires no such result. The plaintiff in *Parratt* was an inmate who ordered a $23.50

hobby kit which was either stolen or misplaced. This Court noted that the key question presented was not whether due process applied, but what process was due. Given the impossibility of providing a hearing prior to unforeseeable deprivations of property, the Court ruled that a post deprivation hearing provided by state law, providing full reimbursement for the $23.50 loss, was sufficient.

In the cases following *Parratt* , the Supreme Court has consistently taken into consideration the State's ability to actually give a pre-deprivation hearing, and the adequacy of the remedy provided (*Hudson v. Palmer*, 468 U.S. 517 (1984)), *United States v. James Daniel Good Real Property*, 510 U.S. 43 (1993). Taken together, these cases hold that when a person is deprived of a non- fundamental property interest, due process is required. However, where the State cannot foresee the timing of a random deprivation, a post- deprivation hearing and the provision of an adequate remedy by state law , will satisfy the constitution. Thus in *Logan v. Zimmerman Brush Company* , 455 U.S. 422 (1982), where the state remedy was deemed inadequate for lack of provision for reinstatement, *Parratt* was inapplicable.

It is difficult to identify any relevance of these cases . It was not "impracticable" for the government officials to offer Ms. Harbury a "pre-deprivation hearing." To the contrary, the Petitioners here had many months, if not far longer, to permit Ms. Harbury to approach the courts. Instead they chose to obstruct her.

Nor are the *Parratt* decisions regarding adequate state remedies relevant here. In all of those cases, the plaintiffs' claims were, in the first place, claims for money damages. As the state legal systems also provided for similar, if not identical, awards of money damages, such remedies were found adequate. However, as *Logan* made clear, a monetary award will not constitute the qualitative equivalent of injunctive relief to prevent irreparable harm.

F. A Remedy for the Access to Courts Violation Presented Here Will Not Interfere with Foreign Affairs or Otherwise Chill Any Discretionary Functions of Government Officials.

Petitioners urge that a favorable ruling in this case will unduly interfere with matters of foreign affairs or military operations. These matters were raised for the first time on appeal, and the D.C. Circuit, noting that "fact finding is the basic responsibility of the district court", properly ruled that such claims must first be presented to the lower court for a full hearing and resolution. (Denial of Rehearing, p. 957). See *Pullman-Standard v. Swint*, 456 U.S. 273, 291-291, (1982) Ms. Harbury does indeed dispute the existence of any such bona fide foreign affairs or military concerns here, and would seek to present evidence to the lower court regarding her claims of pretext. Numerous factual disputes are presented.

The purpose of a motion under Rule 12(b)(6) is to test the sufficiency of the statement of a claim for relief

and is not a mechanism for the resolution of a factual dispute. As stated by this Court in *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957), "[A] complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Conversely, if a determination of disputed fact is required, dismissal under Rule 12(b)(6) is improper. *Johnson v. Revenue Management*, 169 F.3d 1057, 1059 (7th Cir. 1999). Given the availability of the summary judgment mechanism, the Petitioners would not be subjected to undue delays or expenses. Moreover, it is only after such a full presentation that the foreign affairs question may be determined. The Petitioners cannot act as both litigants and final arbitrator in this case. *United States v. Reynolds*, 345 U.S. 1, 8 (1953).

Ms. Harbury would simply note here that a proper remedy in this case would in no way interfere with the government's conduct of foreign affairs. The sole claim presented in this case is whether or not U.S. officials may, through affirmative acts of deception, prevent a citizen from filing suit against the government for emergency relief. The courts are not asked to evaluate the history of American foreign policies or diplomatic decisions in Guatemala, to question or prohibit military aid or the even the use of informants. No requirements for change or reform are in question.

Nor will the provision of a remedy create any chilling effect on the ability of our diplomatic corps in

the exercise of their day to day duties. Petitioners strongly urge that U.S. officials must be free to give nuanced and sometimes even evasive answers in certain circumstances. The appellate court ruling in this case in no way forecloses any needed flexibility. Nuances and finesses will remain permissible as long as they are not issued with the specific intent of barring access to the courts. Moreover, the line between accepted and forbidden deceptions are brightly drawn by the common law principles of deceit. An official, having offered to assist, is precluded from making deceptive statements, knowing that the person will rely thereon to his detriment Given the clear and limited parameters of such prohibited conduct, there should be no chilling effect other than the desired deterrence of unconstitutional actions. Meanwhile, officials remain free to avoid comment on delicate issues, remain silent, or assert a glomar denial.

Lastly it is noted that a remedy based on the underlying facts of this case harmonizes with long standing American foreign policy principles and priorities. The United States has always condemned and prohibited torture, as discussed above. Congress emphasized this position in 1992, enacting the Torture Victim Protection Act of 1991, Pub.L. No. 102-256, 106 State. 73 (1992) (codified at 28 U.S.C. §1350). As stated in the legislative reports accompanying the statute, "Official torture and summary execution violate the standards accepted by virtually every nation." S. Rep. No. 249, 102d Cong., 1st session, (1991); H.R. Rep. No. 367, 102nd Cong., 1st session pt.1 (1991). See also, the

International Covenant on Political and Civil Rights, ratified in 1992, art.7, 1966 S. Treaty Doc. No. 95-2, 999 U.N.T.. 171. In 1992 the United States also ratified the International Covenant on Political and Civil Rights, (1966), S. Treaty Doc. No. 95-2, 999 U.N.T.S. 171. The Geneva Convention, article 3, 130 has prohibited torture for many decades. 6 U.S.T. 3316, T.I.A.S. No. 3364.

G. A Bivens Remedy Is Fully Appropriate Here; the FOIA System Provides No Adequate Cause of Action or Remedy.

Petitioners also assert that because the Freedom of Information Act provides for extensive and detailed regulation of the flow of information concerning government activities, no independent *Bivens* claim under the United States Constitution is proper here.

At the outset, Ms. Harbury notes that this argument is unrelated to the questions presented to this Court for consideration in this case, and is raised for the first time in the Petitioners' brief on the merits. It has never been presented to the courts below, and is thus improperly included here. Without waiving her position in this regard, she responds as follows.

In 1971 this Court ruled in *Bivens v. Six Unknown Named Agents of the Federal Narcotics Bureau,* 403 U.S. 388, that a plaintiff may sue federal officers for money damages directly under the constitution for violations of the Fourth Amendment. The ruling was carefully limited, and a number of factors were set forth. In *Davis*

v. Passman, 442 U.S. 228 (1979), the Bivens remedy was specifically extended to the Fifth Amendment in the context of a discriminatory discharge. Significantly, the Court found that the plaintiff had no other adequate remedy., as her former employer was no longer in office, and injunctive relief was thus unavailable.

Lastly in *Carlson v. Green*, 446 U.S. 14, (1980), the Court declared that the availability of a claim under the Federal Tort Claims Act would not bar a Bivens remedy for a constitutional violation. Thus Respondent's remaining claims in the court below in no way displaces her cause of action for violation of access to the courts. Nor do the Federal Tort Claims Act exemptions indicate a Congressional intent to shield intentional torts or acts of deceit. To the contrary, the Act specifically waives exclusivity with respect to unconstitutional actions. 28 U.S.C. 2679(b)(2).

Although the Court has taken care to curb undue extensions of the Bivens doctrine over the years, none of those cases is apposite here. *Correctional Services v. Malesko*, 122 S.Ct. 515, 151 L.Ed 2d 456 (2001), and *Federal Deposit Insurance Corp. v. Meyer*, 510 U.S. 471 (1994) both refused to extend Bivens claims to agencies, as a key function of the Bivens remedy is deterrence of the abuse of power by individual federal officials. The egregious violations here warrant such deterrent effect.

As discussed above, there are no special considerations counseling hesitation here. The courts are not asked to evaluate the wisdom of our foreign

affairs history in Guatemala. Nor are special military issues in question, as in *Chappell v. Wallace*, 462 U.S. 296, (1983). Neither Petitioners nor Ms. Harbury are members of the military. Moreover, even in *Chappell*, the plaintiff was provided with an adequate remedy, including retroactive back pay and promotion.

The Petitioners also urge that the FOIA statute itself is the sort of comprehensive scheme described in *Bivens* as a basis for avoiding a constitutional remedy, citing *Bush v. Lucas*, 462 U.S. 367 (1983). In that case, a NASA engineer sued for retaliatory demotion. The Civil Service Commission had already restored his position, with backpay. This Court recognized that Congress had established a complete system of remedies for federal employees, which had more than adequately protected the plaintiff's constitutional rights. In *Schweiker v. Chilicky*, 487 U.S. 412 (1988) the plaintiffs' benefits had been wrongfully terminated but then reinstated. Noting the detailed nature of Social Security system, and the provision of a constitutionally adequate, though not identical, remedy, the Court declined to fashion an additional *Bivens* remedy.

In attempting to apply these rulings, Petitioners overlook the fact that Ms. Harbury has been left with no adequate remedy at all for her lost day in court. By referring her to her FOIA remedies, they again misunderstand the basic nature of her complaint. Had the Petitioners, 1993, simply refused to respond to her questions, or issued a glomar denial, then her remedy, might well be embodied in that statute. The FOIA

provisions do not begin address issues of intentional acts of deception geared to prevent a citizen from filing suit against the government. Petitioners may not, for years, falsely insist that no information exists in order to prevent such an urgent suit, then defend on the grounds that Ms. Harbury should have either guessed that they were deceiving her or filed a FOIA request anyway for such "non existant" files. Nor does the FOIA offer any remedy which can make whole the loss of this fundamental and long recognized constitutional right to access to the courts. See *Jones v. FBI*, 41 F.3d 238, 246 (6th Cir. 1984)(FOIA not intended as primary vehicle for prosecuting agency misbehavior). Given this reality, the Petitioner's argument is contradicted by *Bush*, *Chilicky* and even *Chappell*, in which substantial and adequate remedies had already been provided.

Public policy concerns also weigh strongly against the Petitioners' FOIA argument here. If accepted, federal officials engaging in unconstitutional or rogue operations could first conceal their actions, utilizing deception to prevent discovery or even the initiation of any FOIA proceedings, in order to avoid being subjected to a suit. They could then defend with the very FOIA provisions they themselves had thwarted to prevent any judicial review. In short, they could twice evade the courts.

The *Bivens* remedy was created precisely for the situation at hand, where a strong need for deterrence is coupled with a complete lack of alternate remedies.

II. THE CONSTITUTIONAL RIGHT AT ISSUE WAS CLEARLY ESTABLISHED; AND QUALIFIED IMMUNITIES DO NOT APPLY

Petitioners violated Ms. Harbury's constitutional right of access to the courts when, as she alleges, they intentionally deceived her about her husband's plight in order to prevent her from seeking emergency legal redress. They are not protected from liability by qualified immunity, because the right was "clearly established"at the time they acted, *Anderson v. Creighton*, 483 US. 635, 639 (1987), and a reasonable official would have understood that those actions violated the Constitution. *Id.*; *Harlow v. Fitzgerald*, 457 U.S. 800, 819 (1982).

Qualified immunity has developed through a careful balancing of two competing values, the need to protect citizens from unlawful acts of government officials, and the need of officials to perform their duties without the constant fear of insubstantial lawsuits. *Harlow v. Fitzgerald*, 457 U.S. at 807; *Butz v. Economou*, 438 U.S. 478, 504-06 (1978). Petitioners emphasize the second of these important goals but fail to acknowledge the first. *Elder v. Holloway*, 510 U.S. 510, 515 (1994); *Correctional Services Corporation v. Malesko*, 122 S.Ct. 515, 521, 522 (2001). In the interest of deterrence, the qualified immunity standard intentionally imposes some burden on government officials, forcing them to pause to consider whether a proposed course of action can be squared with the Constitution. *Mitchell v. Forsyth*, 472 U.S. 511, 524

(1985). As explained in *Mitchell* this is precisely the point.

A government official will be held personally liable for a constitutional violation where the legal rules were clearly established at the time of the acts in question. *Anderson v. Creighton*, 483 US. at 639; *Harlow v. Fitzgerald*, 457 U.S. at 819. The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. It is not necessary that the law have been applied in identical circumstances, *Anderson* at 640, *Mitchell* at 535, n.12. See also *United States v. Lanier*, 520 U.S. 259 (1997).

"[T]he appropriate question is the objective inquiry into whether a reasonable officer could have believed that the challenged conduct was lawful." *Wilson v. Layne*, 526 U.S. 603, 615 (1999).

Here, the relevant question is whether a reasonable government official, knowing that respondent's husband was alive and suffering torture by U.S. government agents, could have believed that it was lawful to deceive her, to prevent her from seeking judicial relief to save his life. The answer can only be no.

By 1993 it was well-established that a cover-up that prevented a U.S. citizen from filing a lawsuit would violate the Constitution. As long ago as *Marbury v. Madison*, 1 cranch 137, (1803), this Court has ruled that "The very essence of civil liberty certainly consists

in the right of every individual to claim the protection of the laws." Moreover, the obstruction or concealment of crucial information or evidence has been deemed a violation of the right to access to a fair hearing for decades, as discussed in the numerous rulings of this Court cited above. See *Bell v. City of Milwaukee*, 746 F.2d 1205 (7th Cir. 1984), *Ryland v. Shapiro*, 708 F.2d 967 (5th Cir. 1983). *Barrett v. United States*, 798 F.2d 565 (2d Cir. 1986)

No reasonable official could have thought it constitutional to intentionally deceive a U.S. citizen about the torture and imminent murder of her husband at government hands, to avoid suit for emergency injunctive relief. Indeed, such conduct in and of itself shocks the conscience. Such startling actions clearly weigh in favor of deterrence, and the protection of the citizenry from abuses of power by individual officials. Qualified immunity is inappropriate in this case.

CONCLUSION

Ms. Harbury has clearly stated a cause of action upon which relief may be granted; specifically, that her constitutional right to access to the courts of law was violated by the Petitioners. Such rights were clearly established at the time of the violations, and Petitioners are not entitled to qualified immunity. The decision of the circuit court should be affirmed, and this case should be remanded to the United States District Court for further proceedings.

February 2002

Respectfully submitted,

Jennifer K. Harbury
Counsel of Record
300 South Texas Boulevard
Weslaco, Taxas 78596
(512) 751-5852

Respondent in propria persona

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APPENDIX A

APPENDIX A

Geneva Convention Relative to the Treatment of Prisoners of War of August 12, 1949, art. 3, 6 U.S.T. 3316, T.I.A.S. No. 3364 :

Article 3 : In the case of armed conflict not of an international character occurring the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions :
(1) Persons taking no active part in the hostilities, including members of the armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without adverse distinction founded on race, colour, religion, or faith, sex, birth, or wealth, or any other similar criteria. To this end the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:
(a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture; (b) taking of hostages; (c) outrages upon personal dignity, in particular humiliating and degrading treatment; (d) the passing of sentences and the carrying out of executions without previous judgement pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized people.

APPENDIX B

APPENDIX B

ACCESS TO GOVERNMENT INFORMATION AND H.R. 2635, HUMAN RIGHTS INFORMATION ACT

Hearing
Before the
Subcommittee on Government Management, Information, and Technology
of the
Committee on Government Reform and Oversight
House of Representatives
One Hundred Fifth Congress
Second Session
on
H.R. 2635
To provide a process for declassifying on an expedited basis certain documents relating to human rights abuses in Guatemala and Honduras

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May 11, 1998

Serial No. 105-175

Printed for the use of the Committee on Government Reform and Oversight

U.S. Government Printing Office
Washington: 1999

For sale by the U.S. Government Printing Office
Superintendent of Documents, Congressional Sales Office, Washington, DC 20402SBN 0-16-058288-1

United Stated Department of State
Washington, D.C. 20520

November 9, 1993

Dear Senator Brown:

Thank you for your letter of October 12 informing us of the concerns of your constituent _____ regarding the wherabouts of Efrain Bamaca Valasquez.

Mr. Efrain Bamaca Velasquez, a top field Commander of the Guatemala National Revolutionary Unity (URNG), and believed to be personally close to Guerilla leader Rodrigo Asturias (aka "Gasper Ilom"), disappeared after a March 12, 1992 clash with an Army unit near Retalhuleu. Shortly thereafter, the URNG made discreet inquiries concerning his whereabouts and learned he reportedly had been buried after the clash in an anonymous grave nearby. In February 1993, two URNG guerillas claimed in Geneva that they had been held in clandestine Guatemalan Army prisons before escaping. The guerillas claimed to have seen Mr. Bamaca in March and July, 1992.

The Office of the Human Rights Ombudsman assisted with exhumation arrangements last year, but

then-Attorney General Acisclo Valladares appeared at the scene and suspended proceedings, allegedly because there was no way to identify the exhumed body. Ms. Jennifer Harbury, wife of Mr. Bamaca, contacted the Embassy on March 9, to request assistance in determining Mr. Bamaca's whereabouts.

On August 17, a U.S. forensic expert and a Guatemalan forensic team participated in the exhumation of the grave in Retalhuleu. Ms. Harbury, a representative of the U.S. Consular Section of the US Embassy in Guatemala, and international human rights observers were also present. Following an exhaustive effort, all present concluded that the body in the grave was not that of Efrain Bamaca Velasquez. Our embassy has been assured by Guatemalan authorities that Mr. Bamaca's case will remain open until he is found.

The Honorable Hank Brown,
United States Senate

We have no independent information confirming the existence of clandestine Guatemalan military prisons. We note, however, that America's Watch recently prepared a report documenting several cases in which persons claimed to have been held in secret army jails. We have no independent information regarding the whereabouts of Mr. Bamaca.

As you know, Guatemala's constitutional crisis was resolved with the election by the Guatemalan Congress of highly respected former Human Rights Ombudsman Ramiro de Leon Carpio as President on June 6. We believe that President de Leon represents the best hope in a generation of realizing fundamental change in the political culture of Guatemala. We will continue to support President de Leon's efforts to improve the human rights situation in his country.

I hope that this information has been of help in responding to your constituent. Please contact me if I can be of further assistance.

Sincerely,

Wendy R. Sherman
Assistant Secretary
Legislative Affairs

Enclosure:
Correspondence returned

APPENDIX C

APPENDIX C

ACCESS TO GOVERNMENT INFORMATION AND H.R. 2635, HUMAN RIGHTS INFORMATION ACT

Hearing
Before the
Subcommittee on Government Management,
information, and technology
of the
Committee on Government Reform and Oversight
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U.S. Government Printing Office
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Package Subject: Q&A Problem

Item Title: Q&A Problem

3-29-95, 8:25am

We should not use the "legally proscribed from releasing classified intelligence to private individuals . . . language" I suggested yesterday; I'm sorry I steered you wrong on this. After our exchange of a e mails I consulted INR's person in L. His comments are attached and make sense. Their view, in short, is that we (the exec. branch) could have made a decision to declassify the intell and share it with Harbury.

Sorry,

ps-let me know if I need to call anyone on the 7th fl. to correct this.